

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CALIFORNIA VIRTUAL ACADEMIES  
AND SPENCER VALLEY ELEMENTARY  
SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2015080474

**DECISION**

California Virtual Academies and Spencer Valley Elementary School District filed a due process hearing request with the Office of Administrative Hearings on August 12, 2015, naming Parents on behalf of Student.

Administrative Law Judge Paul H. Kamoroff heard this matter in Riverside, California, on September 8, 9, and 10, 2015.

Megan M. Moore, Attorney at Law, appeared on behalf of CAVA. Kacey Lowery, Director of Special Education, and Laura Terrazas, Dean of Student Services, attended each day of the hearing on behalf of CAVA.

Karin Anderson, Attorney at Law, appeared on behalf of Spencer Valley. Julie Weaver, Superintendent for Spencer Valley, attended each day of the hearing.

Student's father appeared on behalf of Student. Student's grandfather attended the first day of the hearing. Student was not present during the hearing.

The record closed on September 28, 2015, upon receipt of written closing briefs from the parties.

## ISSUES<sup>1</sup>

Whether the following triennial assessments of Student were conducted lawfully by CAVA and Spencer Valley, such that the school districts do not have to fund independent educational evaluations requested by Student's parents?<sup>2</sup>

1. Psychoeducational evaluation;
2. Occupational therapy evaluation;
3. Speech and language evaluation; and
4. Assistive technology evaluation.

## SUMMARY OF DECISION

This Decision finds that CAVA and Spencer Valley's triennial assessments of Student were conducted by qualified personnel and met all statutory requirements, with the exception of the assistive technology evaluation. Because CAVA and Spencer Valley failed to provide Student an adequate assistive technology assessment the school districts must fund an independent educational evaluation in that area, as requested by Student's parents.

## FACTUAL FINDINGS

### *The Student*

1. Student was a ten-year-old boy who has been, and continues to be, eligible for special education under the eligibility category speech and language impairment. Student has also been identified with specific learning disabilities in math and written expression. At the time of the hearing, Student attended CAVA, San Diego, and had just begun his fifth grade in a regular education, on-line classroom.

2. Beginning in the 2010-2011 school year, Parents enrolled Student at CAVA, a charter school authorized by Spencer Valley. CAVA operated as its own local educational agency. Student's CAVA program was a parent-choice, home-study program, governed by California's independent study laws. Mother served as Student's one-to-one "learning

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<sup>1</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

<sup>2</sup> In California, the term "assessment" is used interchangeably with "evaluation."

coach,” and Student’s instruction was overseen by a general education and special education teacher. Student participated in CAVA’s on-line classes, with Mother’s assistance, during which he was taught the California standards based curriculum and received special education and related services.

3. Student has been diagnosed with childhood apraxia of speech. Childhood apraxia of speech is a neurological speech sound disorder in which the precision and consistency of movements underlying speech are impaired in the absence of a neuromuscular deficit. As a result, Student had problems saying sounds, syllables, and words. His brain had difficulty planning to move the body parts (e.g., lips, jaw, tongue) needed for speech. Student knew what he wanted to say, but had difficulty coordinating the muscle movements necessary to say those words. Concomitant with speech and language delays, Student experienced fine motor delays, including difficulty in handwriting.

### *Background*

4. On January 9, 2015, CAVA sent Parents a prior written notice letter which proposed conducting Student’s triennial evaluation. Before any child can be found eligible for special education, a school district is required to assess the child in all areas of suspected disability. Once a child has been found eligible for special education, a school district must reassess the child at least every three years, a triennial evaluation, unless the parents and district agree otherwise. Student had been previously assessed by CAVA, so the proposal was for CAVA to reassess Student. Reassessments require parental consent. To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student’s parents. The notice consists of the proposed assessment plan and a copy of parental procedural rights under the Individuals with Disabilities Education Act and companion state law. The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an individualized education program without the consent of the parent. The district must give the parents and/or pupil 15 days to review, sign, and return the proposed assessment plan.

5. CAVA’s January 9, 2015 letter properly included a copy of Student’s special education procedural safeguards, along with an assessment plan. The assessment plan was in English, the language used by Student and his parents. The plan was easy to understand and included assessments for health by the school nurse; speech and language by a speech and language pathologist; motor development by an occupational therapist; assistive technology by an assistive technology specialist; and academic achievement, intellectual development, social/emotional, and adaptive behavior by the school psychologist. On February 9, 2015, Parents returned a signed copy of the assessment plan, agreeing to CAVA’s proposed reassessments.

6. When a parent agrees to an assessment plan, an IEP team meeting to review the results of an assessment must be held within 60 calendar days, not counting days between a pupil's regular school sessions, terms, or days of vacation in excess of five school days, from the receipt of the parent's written consent to the assessment, unless the parent agrees in writing to an extension.

7. CAVA timely completed the triennial evaluations in March and April 2015. Kacey Lowrey, CAVA's Director of Special Education, or her attorney, sent letters or email correspondence to Parents on March 4, 17, 23, 30, and April 2, 2015, to coordinate the scheduling of assessments and an IEP team meeting to review the assessments. On May 22, 2015, Ms. Lowrey sent Parents another written request to schedule the IEP meeting. Parents agreed to convene an IEP team meeting on June 1, 2015, more than 60 days from their consent to the assessment plan. CAVA took reasonable steps to ensure that the IEP team meeting was held in a timely manner, and Parents agreed to an extension of the requisite 60 days allotted to hold the IEP meeting.

8. CAVA held a two-part IEP team meeting on June 1 and June 30, 2015, to review the triennial assessments. Parents attended each meeting with counsel, and requested that CAVA provide Student independent educational evaluations in the areas of occupational therapy, speech and language, assistive technology, and psychoeducational development. When a parent requests an independent educational evaluation at public expense, the local educational agency must, without unnecessary delay, fund the requested evaluation or file a complaint for a due process hearing to defend its assessment. Here, CAVA and Spencer Valley elected to defend its assessments and timely filed a complaint for due process on August 12, 2015. Therefore, the narrow purpose of the hearing for this matter was to determine the adequacy of CAVA's (1) psychoeducational, (2) occupational therapy, (3) speech and language, and (4) assistive technology assessments.

### *The Psycho-Educational Evaluation*

9. On April 27, 2015, CAVA completed a triennial psycho-educational evaluation for Student. CAVA's school psychologist Teri Ede was charged with conducting the assessment. Ms. Ede received a bachelor's degree in psychology in 1995 and a master's degree in counseling in 1998. She had over 17 years' experience as a school psychologist and had been CAVA's lead school psychologist since 2011. Ms. Ede was a capable assessor and she presented knowledgeable and persuasive testimony during the hearing.

10. Ms. Ede's assessment of Student used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, and included information provided by Student's mother and father. She did not use any single measure or assessment as the sole criterion for determining whether Student had a disability. She used technically sound instruments that assessed the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used were selected and administered so as not to be discriminatory on a racial or cultural basis. They were provided in English, Student's spoken language, and in a form most likely

to yield accurate information on what the Student knew and could do academically, developmentally, and functionally. The assessments were used for the purposes for which the assessments were valid and reliable, administered by a trained and knowledgeable school psychologist and administered in accordance with any instructions provided by the producer of each assessment. Ms. Ede determined which tests were required based on information known at the time. No single measure, such as a single intelligence quotient, was used to determine eligibility or services.

11. Ms. Ede carefully administered various standardized tests for Student. She first administered the Cognitive Assessment System Second Edition, which tests the cognitive functioning of children and adolescents, with an emphasis on planning, attention, and simultaneous and successive cognitive processing. Results of this tests showed that Student was delayed in the area of planning, with a score in the fourth percentile. This means that 96 percent of Student's same aged peers had a higher ability level in this area. Student also had delays in the areas of successive planning and working memory, with scores in the 13th and 16th percentiles, respectively. Testing results yielded average scores in the areas of attention and executive functioning.

12. On the Comprehensive Test of Nonverbal Intelligence, which assessed intellectual ability nonverbally, Ms. Ede found that Student had average abilities, with a score at the 37th percentile in pictorial analogies, and in the 63th percentile in geometric analogies.

13. Ms. Ede next administered the Test of Auditory- Perceptual Skills, Third Edition. This test was designed to assess a child's ability to process and comprehend auditory information. Student attained an average score, at the 50th percentile, in the area of phonological processing, and a below average score in the area of memory skills.

14. Ms. Ede utilized various inventories to determine Student's social, emotional, and behavioral needs, including the Conners' Three Rating Scale and the Vineland Adaptive Behavior Scales, Second Edition. These inventories were given to Student's parents. Results of the Conner's indicated that Student had age appropriate skills in social, emotional, and behavioral domains. No areas of concern were noted in any area. Results from the Vineland found that Student had above average adaptive skills and noted no areas of concern.

15. Finally, Ms. Ede administered the Woodcock-Johnson IV achievement test to assess Student's scholastic aptitudes and academic achievement. Testing yielded average results in the areas of reading and spelling skills, with lower than expected progress in math and expressive writing skills.

16. CAVA's psycho-educational evaluation determined that, in addition to a speech and language impairment, Student qualified for special education and related services as a child with a specific learning disability in the areas of math reasoning and written expression.

17. Upon completion of her testing, Ms. Ede prepared a report entitled “Psycho-Educational Assessment Report” where she described her test battery and findings. The report included various recommendations, including specialized academic instruction, occupational therapy, speech and language therapy, access to a keyboard, frequent breaks, and visual and auditory instruction, amongst other recommendations.

18. During hearing, Student presented no evidence which impugned the validity of CAVA’s psycho-educational assessment. In fact, evidence overwhelmingly showed that Ms. Ede was qualified to perform the assessment, and did so with competence and in accord with the required protocols.

### *The Occupational Therapy Assessment*

19. Lindsey Gump performed CAVA’s occupational therapy assessment of Student. Ms. Gump was a registered occupational therapist who obtained her bachelor’s degree in occupational therapy from the University of Southern California in 2004. Ms. Gump has been the owner and operator of ELM Healthcare and Apex Pediatric therapy, a nonpublic agency contracted with CAVA, since 2007. She has extensive experience working as an occupational therapist in educational settings, and performed numerous evaluations of pupils with exceptional needs, including children with apraxia. Ms. Gump testified at the due process hearing, and she was a credible and persuasive witness. She was trained and knowledgeable in the field of occupational therapy, and competent to perform the assessment of Student. She performed the reevaluation on the premises of her clinic office.

20. For her reevaluation, Ms. Gump utilized a test battery that included both standardized and non-standardized measures. The non-standardized methods of assessment included: (1) a records review; (2) a parent interview; (3) a teacher interview; (4) Student interview; and (5) skilled observations of Student during her testing. For her records review, Ms. Gump reviewed existing evaluation data of Student, including an April 2011 Report of Occupational Therapy Evaluation prepared by Robyn Chu, and IEP’s for the past five years.

21. Ms. Gump utilized the following standardized test instruments: (1) the Sensory Processing Measure, Home Form; (2) specific task completion; (3) the Wold Sentence Copying Test; (4) the Wide Range Assessment of Visual Motor Skills; and (5) the Evaluation Tool of Children’s Handwriting. Student was comfortable and engaged during the testing. He quickly and easily conversed with the examiner and was compliant to her instruction. During her observation, Student demonstrated decreased joint stability in his thumb and joints. Student had decreased hand strength and difficulty opening a bottle and a jar. He also had difficulty with upper body stability.

22. Ms. Gump carefully selected the standardized tests after observing Student and interviewing his parents. She selected and administered test procedures that were not racially, culturally, or sexually discriminatory; she administered the test procedures in Student’s native tongue, which was English; she utilized a variety of assessment measures; she followed the test protocols; and she used the tests for purposes for which the assessments

were valid and reliable. She chose tests consistent with Student's identified disability as a child with apraxia, and she selected the home form of the Sensory Processing Measure because Student attended a virtual classroom located in his home.

23. The Sensory Processing Measure is a rating scale that enables the assessment of sensory processing, social participation and praxis, which is the ability to plan and organize movement. Mother completed the Sensory Processing Measure forms and her responses indicated that Student demonstrated typical performance; no planning, praxis, or sensory processing delays were reported. Ms. Gump utilized specific task completion tests to determine Student's ability to manipulate objects with his hands. Student was able to manipulate paper, pencils, and scissors with either hand and with proper grasping techniques. However, Student had difficulty in handwriting. Results of the Evaluation Tool of Children's Handwriting showed that Student's handwriting was illegible. Even with prompts and assistance, Student was unable to produce clear, legible writing with appropriate spacing. Work samples were consistent with Ms. Gump's testing, and included mixed letter case, decreased orientation to baseline, and poor letter formation.

24. Ms. Gump next administered the Wide Range Assessment of Visual Motor Skills, which tests visual motor, visual spatial, and fine motor abilities. Student demonstrated difficulty copying figures and received a below average score, in the 6th percentile, in the area of visual motor skills. Student received average scores in visual spatial and fine motor skills, in the 66th percentile and the 34th percentile, respectively.

25. Overall, Ms. Gump found that Student did not present needs in self-care, bilateral coordination, sensory processing, or postural control. Student did present needs in handwriting, ocular control, visual motor, visual perceptual skills, hand skills, strength, and proximal ability.

26. Upon completion of the reevaluation, Ms. Gump prepared a report entitled "Occupational Therapy Assessment Report," which described her test battery and the results of the various assessment procedures that she employed. The report concluded that Student required occupational therapy services as part of his special education program.

27. During hearing, Student failed to present any evidence, including testimony from an occupational therapist, which called into question the validity of the occupational therapy report or the competency of the assessor.

### *The Speech and Language Assessment*

28. Megan McCann performed CAVA's speech and language assessment. Ms. McCann was a licensed speech pathologist who has provided speech services for students with speech and language disorders, including childhood apraxia of speech, for over 20 years. Ms. McCann has bachelor and master of arts degrees in communication disorders. The American Speech-Language Hearing Association has granted her a certificate of clinical competence. She founded, and has worked as a speech pathologist at, Lucid Speech and

Language Center, a nonpublic agency which is routinely contracted by CAVA, for 17 years. Ms. McCann testified at the due process hearing and presented as competent and persuasive. Ms. McCann had sufficient training and knowledge to perform the speech and language evaluation of Student.

29. For the evaluation under scrutiny in this case, Ms. McCann performed her reassessment of Student over the course of two days in March and April 2015. She employed a test battery that included both standardized and non-standardized measures. She selected and administered test instruments that were not racially, culturally, or sexually discriminatory; administered the test procedures in English; utilized a variety of assessment measures; followed the test protocols; and used tests for purposes for which the assessments were valid and reliable. Student was attentive and receptive during the testing and the results were a valid reflection of his abilities and needs.

30. The non-standardized methods of assessment included: (1) a records review; (2) an interview with Student's past speech pathologist Erin Arnold; (3) a Student interview; and (4) skilled observations of Student during her testing. For her records review, Ms. McCann reviewed existing evaluation data of Student, including a 2011 speech and language report from Stamper and Sanders, and a 2013 speech and language report by Ms. Arnold. She also reviewed each of Student's IEP's for the past five years.

31. Ms. McCann selected the following standardized tests: (1) the Receptive One Word Picture Vocabulary Test, Fourth Edition; (2) the Expressive One Word Picture Vocabulary Test, Fourth Edition; (3) the Test for Examining Expressive Morphology; and (4) the Goldman-Fristoe Test of Articulation. Ms. McCann also used, informally, the Kaufman Speech Praxis Test for Children, and attempted administering the Clinical Evaluation of Language Fundamentals.

32. The Receptive One Word Picture Vocabulary Test assesses a child's single word expressive vocabulary. On this test, Student received a standard score of 129, placing him in the 97th percentile, and indicating that his receptive single word vocabulary skills were within the above average range, a relative strength for him. The Expressive One Word Picture Vocabulary Test assesses a child's single word expressive vocabulary. On this test, Student received a standard score of 101, placing him in the 53 percentile, and indicating that he possessed expressive single word vocabulary skills in the average range. The Test for Examining Expressive Morphology evaluates a child's usage of morphological markers during various sentence completion tasks. Spontaneous and conversational speech, which utilizes morphology, was a significant area of need for Student. Student demonstrated multiple morphological errors during this test and received scores showing that he was five-years-delayed in this area. The Goldman-Fristoe Test of Articulation evaluates articulation skills and measures phonemic production in all positions of the words. Student has a diagnosis of childhood apraxia of speech, which impacted his speech production, including articulation. Student received a standard score of 96, placing him in the 13th percentile, an area of deficit for Student.

33. Ms. McCann next administered the Kaufman Speech Praxis Test for Children. She selected this test specifically because of Student's diagnosis of childhood apraxia. The Kaufman Speech Praxis Test evaluates the phonemic productions of children to determine if articulation, phonological, or praxis disorders are present. In each of four subtests administered, including oral movement, simple phonemic/syllabic level, complex phonemic/syllabic level, and spontaneous length and complexity tests, Student demonstrated serious delays, with scores that were seven to eight-years-delayed.

34. The Clinical Evaluation of Language Fundamentals evaluates receptive and expressive language skills. After administering two subtests, Ms. McCann correctly discontinued this test because Student was familiar with the testing protocols and had guessed a stimulus item correctly before it had been presented to him. Student had recently, within three months, been administered the Clinical Evaluation of Language Fundamentals, and reassessment would yield artificially inflated scores based upon his knowledge of the test, and not based upon his language abilities.

35. In sum, Student presented serious speech and language delays attributable to his disability of childhood apraxia of speech, as well as an expressive language disorder.

36. Upon completion of the reassessment, Ms. McCann prepared a report entitled "Speech and Language Assessment Report," which described her test battery and the results of the different evaluations that she performed. In this report, Ms. McCann made recommendations to develop Student's receptive and expressive language skills, including suggestions to provide cues and verbal prompts when speech errors were present. The report concluded that Student required speech and language therapy to remediate his language deficits.

37. Ms. McCann's report was competent and comprehensive and her testimony was thoughtful and persuasive. No evidence was provided which supported a finding that the speech and language evaluation was defective, or that the evaluator was unqualified.

#### *Father's Testimony*

38. For each assessment, Father testified that he felt the school's assessments were defective because they failed to adequately address the neurological etiology of childhood apraxia of speech. This opinion was unanimously and persuasively contradicted by Ms. Ede, Ms. Gump, and Ms. McCann. The deficits attributable to childhood apraxia of speech, and how such impacted Student's educational development, was encompassed by the testing tools selected by each assessor. Each assessor had experience assessing students with childhood apraxia of speech and each had carefully selected testing instruments that were consistent with Student's disability.

### *The Assistive Technology Assessment*

39. CAVA determined that, in light of Student's disability of childhood apraxia of speech and difficulties noted in handwriting, Student required an assistive technology assessment. Lindsey Schiller was selected by CAVA to perform this assessment and she completed her report on March 23, 2015. The purpose of this assessment was to determine Student's abilities and challenges, and need for assistive technology devices and strategies. Assistive technology devices are any item, piece of equipment, or product system that is used to increase, maintain, or improve the functional capabilities of children with disabilities. Ms. Schiller did not testify at hearing. Rather, Erin Arnold, a speech pathologist employed by CAVA, testified as to the assistive technology assessment.

40. CAVA failed to meet its burden to prove that its assistive technology assessment was adequate on several grounds. First, an assessment must be conducted by persons knowledgeable about that disability. However, Ms. Arnold was not familiar with Ms. Schiller and could not testify as to her experience, education, or training. Other than stating "AT Specialist" after her name, the report itself failed to reflect what, if any, qualifications Ms. Schiller may have possessed when she completed the assessment. Next, Ms. Schiller used a single test to measure Student's abilities, the Wisconsin Assistive Technology Initiative Assessment Student Information Guide. This is a packet of inventories given to Student's parents, therapists, and/or teachers to determine the type of assistive technology, and the features that might be necessary, for a child to utilize assistive technology in the completion of the task. However, the report failed to describe to whom Ms. Schiller provided these inventories, whether the inventories were properly completed, or what the results of the inventories yielded, because this data was not included in the assessment report. CAVA also failed to provide any evidence that showed that the testing protocols had been followed or properly implemented. Finally, Ms. Arnold acknowledged that she was not able to attest to the validity of the assistive technology assessment based on her lack of knowledge of the assessor and what the assessor had done as part of the testing process. As a result of Ms. Arnold's testimony, it is not possible to find that CAVA's assistive technology assessment met the necessary requirements for an assessment of a child with a disability.

41. Moreover, in contrast to the psychoeducational, speech and language, and occupational therapy evaluations, which had been reviewed by their respective evaluators during the June 2015 IEP team meetings, Ms. Schiller failed to attend the IEP meetings or to review her report with Student's parents.

### *The June 2015 IEP Team Meeting*

42. Spencer Valley and CAVA convened an IEP team meeting, held over two days on June 1 and 30, 2015, to review the triennial evaluations with Student's parents. Student was completing the fourth grade and attended CAVA's on-line classroom. Along with Student's parents, the following team members were present at each part of the IEP team meeting: CAVA's Director of Special Education Kacey Lowery, Ms. Ede,

Ms. McCann, Ms. Gump, Ms. Arnold, CAVA's Dean of Student Services Laura Terrazas, special education teacher Leanne Jarvis, and general education teacher Jamie Cocoran. Additionally, Parents' educational advocate and attorney, along with an attorney for CAVA, attended each part of the IEP meeting.

43. The meeting on June 1, 2015, was brief, due to a scheduling conflict with Student's counsel. During this time, Parents shared their concerns regarding Student's present levels of performance. Student worked hard and was eager to achieve. He easily established a positive rapport with peers and adults and tested well when given additional time. Parents expressed concerns in the areas of writing, organization, and speech development.

44. Ms. McCann began reviewing her speech and language assessment during the June 1st meeting. Based upon Parents' request, she agreed to make non-substantive changes to her report. For instance, she agreed to add page numbers, background information regarding student's educational history, and a description of the educational records that she had reviewed prior to the evaluation. Ms. McCann made these changes prior to the June 30, 2015 meeting, and her report was revised to reflect a completion date of June 29, 2015. Parents also requested that CAVA fund an independent speech and language evaluation.

45. The IEP team reconvened with identical participants on June 30, 2015. The team completed its review of Student's present levels of performance. Student was bright and confident and his progress within the online school had exceeded expectations. Student was at grade level in math, literature composition, vocabulary, spelling, science, history, art, and music. He still struggled in writing, particularly in word spacing, punctuation, and grammar.

46. Ms. McCann shared her updated speech and language assessment with the IEP team. She completed the review of her report and recommended that Student be provided individual speech and language therapy, twice weekly at 45 minutes per session. Ms. Ede and Ms. Gump presented their evaluations to the IEP team. Ms. Ede recommended that Student receive specialized academic instruction for writing, math, and organization. Ms. Gump recommended clinic based occupational therapy services. Parents, their attorney, and their advocate freely participated during the IEP team meeting.

47. The IEP team found that Student required 17 new goals in the areas of speech, occupational therapy, math, writing, and organization. To meet these goals, the IEP team offered Student: specialized academic instruction for writing, math, and organization; individual speech and language, two times per week, for 45 minutes per session; occupational therapy, one time per week, for 60 minutes per session; and assistive technology consultation, three times per year, at 30 minutes per session. The IEP found that Student required extended school year services to guard against regression.

48. The IEP team considered a continuum of educational placements for Student and determined that general education, with specialized academic instruction outside of general education, was the least restrictive environment.

49. District staff encouraged Student's parents, their attorney, and their advocate to participate and ask questions during the IEP team meeting. They did so, and each was an active participant during the IEP discussion. Following the IEP team meeting, on August 14, 2015, Student's mother and father approved all parts of the June 2015 IEP.

*The District's Filing of the Due Process Complaint*

50. Parents requested an independent speech and language evaluation on June 1, 2015. Ms. McCann had not yet completed her review of the assessment. Nonetheless, in an effort to ascertain the appropriateness of her assessment and to address Parents' concerns, she completed a revised assessment on June 29, 2015. Ms. McCann reviewed the updated assessment with Parents during the second part of Student's IEP team meeting, held on June 30, 2015.

51. At the conclusion of the June 30, 2015 IEP team meeting, CAVA received Parents' verbal request for independent psycho-educational, occupational therapy, speech and language, and assistive technology educational evaluations. When a parent makes a request for an independent educational evaluation, a school district must either fund the evaluation at public expense or, without unnecessary delay, file for a due process hearing to show that its assessments were appropriate. If the school district prevails in the due process hearing, the parent still has the right to obtain an independent educational evaluation, but not at public expense.

52. In addition, whenever a parent makes a request related to the evaluation of a disabled child, the school district is required to write a prior written notice letter which lays out the school district's response to the request.

53. On August 7, 2015, CAVA sent Parents a prior written notice letter wherein it denied their request for independent educational evaluations. CAVA properly included a copy of Parents' procedural safeguards with the letter. Five days later, on August 12, 2015, CAVA and Spencer Valley filed a complaint for due process hearing to defend its assessments. Consequently, 41 days had transpired between the June 30, 2015 IEP meeting, and the date that CAVA and Spencer Valley filed for due process. CAVA and Spencer Valley did not act unreasonably in filing its complaint on August 12, 2015, and undue time had not transpired since Parents had requested the independent educational evaluations.

## LEGAL CONCLUSIONS

### *Introduction: Legal Framework under the IDEA*<sup>3</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)<sup>4</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a))

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 (*Mercer Island*) [In enacting the IDEA, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes

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<sup>3</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>4</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Therefore, for this matter, CAVA and Spencer Valley had the burden of proof on all issues.

#### *Assessment and Reassessment Standards*

5. Prior to making a determination of whether a child qualifies for special education services, a school district must assess the child. (20 U.S.C. § 1414(a), (b); Ed. Code, §§ 56320, 56321.) After the initial assessment, a school district must conduct a reassessment of the special education student not more frequently than once a year, but at least once every three years. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) By this standard, the assessments in this case are reevaluations of Student.

6. In conducting a reassessment, a school district must follow statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor(s). The district must select and administer assessment materials in the student’s native language and that are free of racial, cultural, and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A)(i); Ed. Code, § 56320, subd. (a).) The assessment materials must be valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) They must also be sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); Ed. Code, § 56320, subd. (c).) Trained, knowledgeable, and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.)

7. In performing a reassessment, such as a triennial assessment, a school district must review existing assessment data, including information provided by the parents and observations by teachers and service providers. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R., § 300.305; Ed. Code, § 56381, subd. (b)(1).) Based upon such review, the district must identify any additional information that is needed by the IEP team to determine the present levels of academic achievement and related developmental needs of the student, and to decide whether modifications or additions in the child’s special education program are

needed. (20 U.S.C. § 1414(c)(1)(B); Ed. Code, § 56381, subd. (b)(2).) The district must perform assessments that are necessary to obtain such information concerning the student. (20 U.S.C. § 1414(c)(2); Ed. Code, § 56381, subd. (c).) In performing a reassessment, an educational agency cannot use a single measure or evaluation as the sole criteria for determining whether the pupil is a child with a disability and in preparing the appropriate educational plan for the pupil. (Ed. Code, § 56320, subd. (e); see also 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2).)

8. Persons who conduct assessments shall prepare a written report, as appropriate, of the results of each assessment. The report shall include, but not be limited to: (a) whether the pupil needs special education and related services; (b) the basis for that determination; (c) the relevant behavior noted during the observation of the pupil; (d) the relationship of that behavior to the pupil's academic and social functioning; (e) educationally relevant health and development, and medical findings; (f) for pupils with learning disabilities, the discrepancy between achievement and ability that cannot be corrected without special education services; (g) a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and (h) the need for specialized services, materials, and equipment for pupils with low incidence disabilities. (Ed. Code, § 56327.)

#### *Independent Educational Evaluations*

9. A parent has the right to obtain an independent educational evaluation if the parent disagrees with a district's assessment. (Ed. Code, § 56329, subd. (b).) When a parent makes a request for an independent educational evaluation, a district must either fund the independent educational evaluation at public expense or file for a due process hearing to show that its assessments were appropriate. (Ed. Code, § 56329, sub. (c).) If the district prevails in the due process hearing, the parent still has the right to obtain an independent educational evaluation, but not at public expense. (*Ibid.*)

10. If a parent requests an independent educational evaluation at public expense, the education agency must, without unnecessary delay, file a due process hearing request to demonstrate that its assessment is appropriate, or ensure that an independent educational evaluation is provided at public expense. (34 C.F.R., § 300.502(b)(2).)

#### *The Assessment Plan*

11. Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the student; explain the assessments that the district

proposes to conduct; and provide that the district will not implement an individualized education program without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents and/or pupil 15 days to review, sign and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

12. Here, On January 9, 2015, CAVA sent Parents a prior written notice letter which proposed conducting Student's triennial evaluation. The letter properly included a copy of Student's special education procedural safeguards, along with an assessment plan. The assessment plan was in English, the language used by Student and his parents. The plan was easy to understand and included a description of the assessments proposed and delineated who would conduct each assessment. On February 9, 2015, Parents returned a signed copy of the assessment plan, agreeing to CAVA's proposed assessments. Consequently, CAVA met its statutory obligations pertaining to its assessment plan.

#### *The Timeliness of the IEP Meeting To Review Assessments*

13. An IEP meeting to review the results of an assessment must be held within 60 days, not counting days between a pupil's regular school sessions, terms, or days of vacation in excess of five school days, from the receipt of the parent's written consent to the assessment, unless the parent agrees in writing to an extension. (Ed. Code, §§ 56043, subd. (f)(1).)

14. CAVA received Parents' signed consent to the triennial evaluations on February 9, 2015. CAVA timely completed the triennial evaluations in March and April 2015. After multiple attempts by CAVA to coordinate the scheduling of an IEP team meeting, Parents agreed to hold the IEP team meeting on June 1, 2015, thereby agreeing to an extension of the 60 day time frame to hold an IEP meeting to review the assessments. On June 1, 2015, at the request of Parents, to accommodate their attorney's schedule, CAVA agreed to extend the IEP team meeting to June 30, 2015. Based upon these facts, CAVA timely held the IEP team meeting to review the triennial evaluations.

#### *Determination of Issues: The Psycho-Educational, Occupational Therapy, and Speech and Language Evaluations*

15. CAVA correctly asserts that its triennial evaluations in the areas of psycho-education, occupational therapy, and speech and language were appropriate and met all necessary requirements.

16. CAVA timely completed its triennial psycho-education, occupational therapy, and speech and language evaluations for Student in March and April 2015. CAVA's assessors properly included the school psychologist, a speech and language pathologist, and a registered occupational therapist. Each assessor thoroughly reviewed Student's educational records and carefully selected assessment tools which were consistent with his age and disability. Each evaluation was conducted in a way that used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, and

include information provided by Student's mother and father. These assessors did not use any single measure or assessment as the sole criterion for determining whether Student had a disability. Each used technically sound instruments that assessed the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used were selected and administered so as not to be discriminatory on a racial or cultural basis. They were provided in English, Student's spoken language, and in a form most likely to yield accurate information on what Student knew and could do academically, developmentally, and functionally. The assessments were used for the purposes for which the assessments are valid and reliable, were administered by a trained and knowledgeable school psychologist, licensed speech pathologist, and registered occupational therapist, and administered in accordance with any instructions provided by the producer of each assessment. Qualified CAVA assessors, including Ms. Ede, Ms. Gump, and Ms. McCann, properly determined which tests were required based on information known at the time. No single measure, such as a single intelligence quotient, was used to determine eligibility or services. All statutory requirements for a reassessment were dutifully complied with by qualified assessors selected by CAVA. (34 C.F.R. § 300.304(c)(7).)

17. Ms. Ede competently administered various standardized tests for Student in the areas of intelligence, nonverbal intelligence, problem solving, memory, and processing speed. She also administered the Test of Auditory - Perceptual Skills, Third Edition. This test was designed to assess a child's ability to process and comprehend auditory information. Ms. Ede used various inventories to determine Student's emotional, behavioral, and adaptive levels of functioning. Finally, she comprehensively assessed Student in scholastic aptitudes and academic achievement. Testing yielded average results in reading and spelling, and a serious delay in math. Ms. Ede was a knowledgeable and capable assessor. Her testing elicited important information regarding Student's individual needs, including that Student had a specific learning disability in addition to a speech and language impairment.

18. Ms. Gump adeptly assessed Student in sensory processing, praxis, planning, organization, and fine motor. She provided additional testing, the Evaluation Tool of Children's Handwriting, which she used to identify a serious delay in the area of handwriting. Even with prompts and assistance, Student was unable to produce clear, legible writing with appropriate spacing. Ms. Gump administered the Wide Range Assessment of Visual Motor Skills to test Student's visual motor, visual spatial and fine motor abilities. Student demonstrated difficulty copying figures and received a below average score in the area of visual motor skills.

19. Ms. Gump found that Student did not present needs in self-care, bilateral coordination, sensory processing, or postural control. Student did present needs in handwriting, ocular control, visual motor, visual perceptual skills, hand skills, strength, and proximal ability.

20. Ms. McCann carefully chose her assessment tools based upon Student's disability of childhood apraxia of speech. She administered the Kaufman Speech Praxis Test for Children, which found Student seriously delayed in oral movement, simple

phonemic/syllabic level, complex phonemic/syllabic level, and spontaneous length, and complexity tests. Ms. McCann adroitly administered the Receptive One Word Picture Vocabulary Test, the Expressive One Word Picture Vocabulary Test, the Test for Examining Expressive Morphology, and the Goldman-Fristoe Test of Articulation. She attempted administering the Clinical Evaluation of Language Fundamentals, but correctly discontinued this test when she learned that Student was familiar with the testing protocols. Ms. McCann was a thoughtful and conscientious assessor who left virtually no area of speech and language need unassessed. Overall, Student presented serious speech and language delays attributable to his disability of childhood apraxia of speech, as well as an expressive language disorder.

21. Upon completion of their evaluations, Ms. Ede, Ms. Gump, and Ms. McCann each prepared comprehensive written reports which were shared with Parents during an IEP team meeting. Parents and their representatives were able to ask questions and participate during the IEP team meetings and did so. For instance, Ms. McCann revised her report based upon Parents' request to add background information and cohesiveness to the report.

22. Student provided no evidence that contradicted the qualifications or competency of the assessors or assessments. Student failed to present a psychologist, occupational therapist, speech and language therapist, or similarly qualified witness to question the experience of the assessors or the validity of the assessments. Father complained that the assessments should have included more information regarding the etiology of Student's disability as a pupil with childhood apraxia of speech. However, Ms. Ede, Ms. Gump, and Ms. McCann each had experience assessing students with childhood apraxia of speech and carefully selected testing instruments consistent with Student's disability. No further testing was required to determine the impact that Student's childhood apraxia of speech had on his educational development. Each assessor persuasively testified that their experience and assessment tools adequately evaluated Student's needs related to his disability.

23. Based upon the foregoing, a preponderance of evidence demonstrates that CAVA performed appropriate psychoeducational, occupational therapy, and speech and language assessments.

#### *The Assistive Technology Assessment*

24. CAVA determined that, in light of Student's disabilities of childhood apraxia of speech and difficulties noted in handwriting, Student required an assistive technology assessment. It therefore included this area of assessment in the January 2015 proposed assessment plan. Parents agreed to an assistive technology assessment when they consented to the assessment plan. Consequently, CAVA's assistive technology assessment must meet the IDEA's legal requirements for an assessment, such as the requirement that assessment tools and strategies provide relevant information that directly assists in determining the educational needs of the child. (34 C.F.R. § 300.304(c)(7).)

25. Here, CAVA did not assess Student’s assistive technology needs within the meaning of the IDEA. First, the assessor selected by CAVA, Ms. Schiller, failed to testify and Ms. Arnold, who testified on behalf of CAVA, was unable to attest to the validity of the assistive technology assessment. Ms. Arnold was not familiar with the assessment and could not affirm that the testing procedures or protocols had been properly implemented or followed. Second, Ms. Schiller’s reliance on a single assessment tool, an inventory, does not suffice to meet the statutory requirement that school districts use “a variety of assessment tools and strategies.” (20 U.S.C. 1414(b)(2)(A) (emphasis added). Third, the record does not show that Ms. Schiller was qualified to assess Student. Ms. Arnold was unfamiliar with Ms. Schiller, and CAVA failed to provide information regarding Ms. Schiller’s training, experience or education. (Educ. Code § 56320(g) [requiring an assessment to be conducted by persons knowledgeable about that disability].)

26. CAVA and Spencer Valley’s failure to appropriately assess Student’s assistive technology needs constitutes a procedural violation of the IDEA. (*R.B., ex rel. F.B.v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 940 (“we have, more often than not, held that an IDEA procedural violation denied the child a FAPE.”).) A procedural violation of the IDEA constitutes a denial of a FAPE “only if the violation: (1) impeded the child’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits.” (Ed. Code, § 56505(f)(2); *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, Missoula, Mont.* (9th Cir. 1992) 960 F.2d 1479, 1484.) Here, Student’s disability resulted in difficulty communicating and handwriting, areas which fall within the purview of assistive technology. Therefore, CAVA’s failure to appropriately assess Student in assistive technology deprived him of educational benefits, and, accordingly, CAVA and Spencer Valley denied Student a FAPE on that basis. (*Carrie I. ex rel. Greg I. v. Dep’t of Educ., Hawaii* (D.Haw. 2012) 869 F.Supp.2d 1225, 1247.) (“The lack of assessments alone is enough to constitute a lost educational opportunity.”.)

#### *Timeliness of Filing the Due Process Complaint*

27. CAVA and Spencer Valley did not delay filing its due process hearing request. Parents first voiced their dissatisfaction with CAVA’s speech and language assessment and requested an independent speech and language evaluation on June 1, 2015. CAVA had a right to review the appropriateness of the assessment before determining whether to grant Parents’ independent education evaluation request. CAVA took into consideration Parents’ concerns regarding the speech and language assessment, and completed a revised speech and language assessment on June 29, 2015. On June 30, 2015, after reviewing the updated report with the IEP team, Parents again requested an independent speech and language evaluation, along with independent psychoeducational, assistive technology, and occupational therapy evaluations.

28. Although CAVA and Spencer Valley were on summer recess, on August 7, 2015, just 37 days following Parents’ request, CAVA sent Parents a prior written notice letter wherein it denied their request for independent educational evaluations. CAVA properly

included a copy of Parents' procedural safeguards with the letter. Five days later, on August 12, 2015, CAVA and Spencer Valley filed a complaint for due process hearing to defend its assessments.

29. The Court in *Pajaro Valley Unified School District v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289 (*Pajaro*), determined that the burden of proof is on the school district to prove that it acted without unnecessary delay in filing for due process. The *Pajaro* court held that three months was considered an unnecessary delay. A two month delay has been held to not be an unnecessary delay. (*J.P. v. Ripon Unified School District* (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 2009 WL 1034993.) Here, CAVA had the right to ascertain whether its speech and language assessment was appropriate, to update the assessment based upon Parents' request to do so, and to complete its review of the assessment at the June 30, 2015 IEP team meeting prior to responding to Parents' request for an independent educational evaluation. Following the June 30, 2015 IEP team meeting, CAVA and Spencer Valley took only 41 days to file their due process request, which does not constitute an unnecessary delay. Therefore, CAVA and Spencer Valley timely filed their complaint for due process.

#### *Remedies*

30. ALJ's have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

31. Appropriate equitable relief can be awarded in a decision following a due process hearing. (*Burlington, supra*, 471 U.S. at p. 374; *Puyallup, supra*, 31 F.3d at p. 1496.) Here, a preponderance of evidence showed that CAVA's assistive technology assessment was not appropriate, which denied Student a FAPE. It is therefore equitable to order that CAVA and Spencer Valley provide Student an independent assistive technology assessment by a qualified assessor, to formulate goals and related services, and to participate in any IEP team meeting convened to discuss the assessment.

#### ORDER

1. Within 10 business days of this Decision, Student's parents will provide CAVA and Spencer Valley with the name of a speech and language pathologist to conduct an independent educational evaluation in the area assistive technology. Within 10 business days of their receipt of Parents' selection, CAVA and Spencer Valley shall contract with the assessor to perform an assistive technology assessment. If Parents fail to timely select an independent assessor, CAVA and Spencer Valley may choose an independent, licensed speech and language pathologist who has experience assessing students with childhood apraxia of speech in the area of assistive technology, to conduct an assistive technology assessment of Student. CAVA and Spencer Valley, if they choose the assessor, shall ensure

that the assessment is completed within 60 calendar days of the date it executes the contract with the assessor. CAVA and Spender Valley shall also fund the cost for up to two hours of the assessor's time to attend the IEP team meeting convened to discuss the assessment.

2. CAVA's psychoeducational, occupational therapy, and speech and language assessments were appropriate.

3. CAVA and Spencer Valley are not required to fund independent educational evaluations in psychoeducational, occupational therapy, or speech and language.

#### PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: CAVA and Spencer Valley prevailed on issues 1, 2, and 3. Student prevailed on issue 4.

#### RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56506, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: October 14, 2015

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/s/  
PAUL H. KAMOROFF  
Administrative Law Judge  
Office of Administrative Hearings